IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236, 77-1269

GENERAL ATOMIC COMPANY, *Petitioner,*

v.

THE HONORABLE EDWIN L. FELTER, JUDGE, *Respondent.*

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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The Government of Canada hereby appears as amicus curiae, and files this brief with the consent of all parties. The pending petitions for a writ of certiorari (Nos. 77-1236 and 77-1269) seek review of two Orders of the Supreme Court of New Mexico that denied the applications of petitioner General Atomic Company ("GAC") for Original Mandamus and Prohibition, thereby continuing in effect a discovery order calling for GAC to produce documents located in Canada, pro-

duction of which is prohibited by Canadian law; and the consequent entry of a Sanctions Order and Default Judgment by the District Court for the First Judicial District of Santa Fe County, New Mexico, because of GAC's failure to produce.[1] The Government of Canada respectfully submits that the state courts have contravened established principles of international comity and of United States law which require deference to the laws and national policies of Canada, and urges this Court to review the actions below.

THE INTEREST OF CANADA

1. Pertinent Canadian Law and Policy

On September 23, 1976, Canada promulgated the Uranium Information Security Regulations which, as amended, provide in pertinent part:[2]

[1] Petition No. 77-1236, filed March 3, 1978, prays that a writ of certiorari issue to review the New Mexico Supreme Court's January 11, 1978 decision denying GAC's application for a writ of prohibition. Petition No. 77-1269, filed March 15, 1978, prays that a writ of certiorari issue to review both the New Mexico Supreme Court's March 2, 1978 decision denying GAC's application for Original Mandamus and Prohibition, and the New Mexico District Court's Sanctions Order and Default Judgment that was entered on the same day. The Government of Canada takes no position on the merits of the case.

[2] P.C. 1976-2368, amended by P.C. 1977-2923 as of October 13, 1977. The background of these Regulations and their nexus with the international uranium marketing arrangement are described in the Canadian Government documents included in the Appendices attached to the Petition for Writ of Certiorari, No. 77-1236, particularly in the statements of the Minister of Energy, Mines and Resources set forth at 13a-24a. Hereinafter citations to the Appendix to Petition No. 77-1236 shall be styled "Pet. 1 App. —," and citations to the Appendix to Petition No. 77-1269 shall be styled "Pet. 2 App. —."

> 3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside of Canada of uranium or its derivatives or compounds, shall (a) release any such note, document or material, or disclose or communicate the contents thereof . . . unless . . . (ii) he does so with the consent of the Minister of Energy, Mines and Resources.[3]

It has been the continuing and oft-stated policy of the Canadian government since September 23, 1976 to enforce these Regulations. Substantial criminal penalties are provided for violation of the Regulations. Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

2. The State Courts' Refusal to Respect Canadian Law and Policy

On October 19, 1977, Alastair Gillespie, the Canadian Minister of Energy, Mines and Resources, responded to a GAC request for a waiver of the terms of the Regulations by stating (a) that waiver of the Regulations in order to permit production of documents would be contrary to the policy of the Government of Canada and would not be granted, and (b) that he had been advised that the requested identification of documents

[3] While the Regulations provide for waiver of the prohibition by the Minister, the High Court of Ontario on Nov. 10, 1977, in *Joe Clark, et al.* v. *Attorney General of Canada* (unreported), struck down the authority of the Minister to grant such dispensations. Since that time no Canadian official has had the authority to waive the terms of the Regulations.

located in Canada would contravene the Regulations.[4] Mr. Gillespie's letter was furnished to the trial court by GAC counsel. Nonetheless, on November 18, 1977, the court entered an order which included the following provisions:

> 1. Defendant, General Atomic Company, forthwith shall identify, clearly and definitively, all documents housed in Canada which are the subject of said motion.
>
> 2. All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, General Atomic Company, and said defendant is precluded from offering evidence herein in opposition to such findings of fact . . . .

In justification of this order, the court observed:

> Deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished through sacrifice of the sovereignty of New Mexico and of due process of law and equal application and protection of law afforded by the laws of New Mexico. In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this State must govern over the national

[4] Pet. 1 App. at 37a-38a. The trial court did not accept the interpretation placed upon the Canadian Regulations by Minister Gillespie, that the Regulations prohibited the identification of documents (compare Pet. 1 App. at 37a-38a, 42a-43a and 44a-46a). However, no effort was made to pursue remedies in Canada and to obtain a more formal or binding opinion from Canadian authorities as by issuance of letters rogatory to a Canadian court. *See Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960) (proper procedure is by letters rogatory). In a diplomatic note which was delivered to this Court on March 15, 1978, the Government of Canada confirmed that it interprets the Regulations as prohibiting the identification of documents which involves drawing upon the information in the documents.

> interest or policy of a foreign country as legislated and conceived by that foreign country. No rule of comity would require a sovereign state of the United States to so abdicate the protection of fundamental rights under its general laws that are necessary to a fair trial in favor of special foreign laws that are not concerned with any aspect or requirement of fair trial.[5]

On December 6, 1977, Mr. Gillespie responded to a further GAC request for a dispensation by stating that, because of an intervening court decision, he no longer possessed the authority to grant a waiver of the Regulations.[6] Three days later, Mr. Gillespie advised Gulf Minerals Canada Limited ("GMCL"), the Gulf subsidiary located in Canada that would have had possession of the documents in dispute, that ". . . the Regulations effectively prohibit Gulf Minerals Canada Limited from assisting General Atomic Company in complying with the District Court in New Mexico, by producing, or identifying, documents coming within the provisions of the Regulations."[7] On the same day, the Government of Canada sent a diplomatic note to the Department of State indicating that Canadian law prohibited identification or production of documents covered by the Regulations, and expressing a deep concern that the trial court had acted in a manner inconsistent with international comity by ordering GAC to contravene Canadian law by causing the identification

[5] Pet. 1 App. 3a-4a. The court's order further invited plaintiff United Nuclear Corp. to "file and serve proposed findings of fact on the factual issues to be determined against Defendant, General Atomic Company, by reason of the non-production . . ." (Pet. 1 App. at 4a).

[6] Pet. 1 App. at 41a.

[7] Pet. 1 App. at 42a-43a.

and production of documents located in Canada.[8] On December 20, 1977, the Department of State transmitted this diplomatic note to the trial court.[9]

On December 27, 1977, the trial court refused to vacate its November 18 order.[10] In an opinion of that date, the court reasoned that, even if Canadian law did prohibit GMCL from producing and identifying documents and this prohibition occasioned GAC's inability to comply with discovery orders, it was nonetheless appropriate to impose sanctions upon GAC. On January 11, 1978 and March 2, 1978, the New Mexico Supreme Court denied GAC's applications for writs of Mandamus and Prohibition. Thereupon, the trial court, acting on the basis of GAC's failure to comply with its discovery orders, imposed sanctions upon GAC by finding facts adverse to GAC on matters which might have been covered by documents located in Canada, and by entering a default judgment against GAC.[11]

DISCUSSION

The Government of Canada respectfully submits that the New Mexico courts have violated well-established principles of international comity, which are recognized by United States law. *E.g., Application of Chase Manhattan Bank,* 297 F.2d 611, 613 (2d Cir. 1962); *cf. Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 423 (1964) (international law principles as part of American law). United States courts have, on

[8] Pet. 1 App. at 11a-12a.

[9] Pet. 1 App. at 8a.

[10] Pet. 1 App. at 44a-46a.

[11] Pet. 2 App. 2a-25a.

the grounds of comity, refused to compel the production of documents located in a foreign state where such production was prohibited by the criminal law of the foreign sovereign, as in this case. *Application of Chase Manhattan Bank,* 297 F.2d 611, 613 (2d Cir. 1962) (law of Panama); *see Federal Maritime Commision* v. *De Smedt,* 268 F.Supp. 972, 974, 975 (S.D.N.Y. 1967) (law of Great Britain and India); *see also Ings* v. *Ferguson,* 283 F.2d 149, 152, 153 (2d Cir. 1960) (law of Canada); *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960) (law of Panama).[12] Thus, in *Ings* v. *Ferguson,* the Second Circuit stated:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts. [Citations omitted]. . . . If upon such proceedings,

[12] In some cases, courts have exercised jurisdiction and issued orders directing production of foreign documents in order to facilitate a clarification of foreign law, or to provide an opportunity for a party to request a waiver of that law. See, *e.g., Societe Internationale* v. *Rogers,* 357 U.S. 197, 205, 206 (1958); *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960). However, once the foreign sovereign has made clear that its criminal laws prohibit compliance and that it will not waive those laws, this justification evaporates and enforcement of production has not been judicially pursued. See, *e.g., Ings* v. *Ferguson,* 282 F.2d 149, 152, 158 (2d Cir. 1960); *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F.2d 616 at 619. Mr. Gillespie's letter of October 19, 1978 removed any justification for the trial court's further exercise of its enforcement jurisdiction, and the court's subsequent efforts to enforce its discovery orders constituted a failure to recognize Canadian sovereignty.

> i.e., letters rogatory . . . . production were declared illegal, the motion to quash should be granted . . . because the exception of illegality under foreign law would have been met. [282 F.2d at 152, 153]

The Uranium Information Security Regulations constitute a legal barrier to the production or identification of documents which should have been respected by the state courts. Indeed, it is the very barrier to which the Tenth Circuit deferred in *In Re Westinghouse Electric Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10th Cir. 1977). In that case, the Court of Appeals reversed an order of contempt and sanctions for noncompliance with a subpoena on the grounds that compliance was barred by the Uranium Information Security Regulations.

It is noteworthy that Canadian law addressing this issue mirrors American authorities. Recently, the Ontario Court of Appeal reversed a trial court's order directing a third party to contravene Panamanian law and provide certain information. *Frischke* v. *Royal Bank of Canada,* 1977 17 O.R.2d 388 (Ontario C.A). In reversing, the court cited analogous United States cases and declared:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws .The principle is well recognized. [17 O.R.2d at 399] [13]

[13] The court cited *United States* v. *First National City Bank,* 396 F.2d 897 (2d Cir. 1968) and *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962). It observed that Canadian courts would defer to foreign law except in ". . . cases of very special circumstances." 17 O.R.2d at 399.

Thus, the decisions of American and Canadian tribunals hold that a court should not direct the production of documents located in a foreign country in situations where the criminal law of that foreign country prohibits such production. The primary rationale for this rule is that, notwithstanding the desire of a litigant to obtain certain information, a discovery order in these circumstances would lead to an unacceptable conflict with foreign law and intrude upon foreign sovereignty. The New Mexico trial court's error flowed from its failure to recognize this principle of comity, and from its contrary and incorrect assumption that the needs of litigation in New Mexico "must govern" and outweigh any interest of Canada or any deference to the law of Canada. See p. 5 *supra.*

In fact, deference to foreign law is required in this case by two factual circumstances, (a) that the documents sought are located in Canada, and (b) that the law of Canada prohibits the production or identification of documents, subject to criminal sanctions.[14] Under the principles of comity and the above-cited authorities, these factors are dispositive; it is impermissible to enforce compliance in the face of the unequivocal Canadian prohibition applicable to conduct and documents in Canada.[15] Furthermore, other facts in the present setting buttress the conclusion that the trial court acted improperly:[16]

[14] This was made clear by Mr. Gillespie's letter of October 19, 1978. See pp. 3-4 *supra.*

[15] Cases cited at 6-8 *supra.*

[16] The scope of relevant considerations is indicated by § 40 of the Restatement of Foreign Relations Law (Second), which sets forth the criteria governing application of the principles of comity and fairness when there are conflicting rules. The Restatement cites

(a) Canada is a friendly government.[17]

(b) The Uranium Information Security Regulations are expressive of a vital Canadian national interest.[18] The importance that the Canadian Government attaches to enforcement of these Regulations has been underscored by its protests to the exercise of enforcement jurisdiction.[19]

(c) A private party's effort to obtain discovery in a case involving New Mexico law does not involve vital national interests of the United States.[20]

(d) The Canadian and American governments have been engaged in consultations exploring means of eliminating the potential conflict between

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such factors as: "(a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." Factors "(c)" and "(d)" are paramount and dispositive here, as noted above; the others support the position of the Government of Canada.

[17] *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960) (Canada is a friendly neighbor).

[18] *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998 (10th Cir. 1977) (Uranium Regulations serve a legitimate "national purpose"). *See generally* Pet. 1 App. at 13a-21a.

[19] *See In Re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 318 (D.D.C. 1960) (foreign governmental protests caused court to delay production); *cf. Arthur Andersen and Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (lack of foreign protest cited as contributing to subpoena enforcement).

[20] *See In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977).

> the application of the United States antitrust laws to international trade, specifically including the U.S. Department of Justice's pending grand jury investigation of the uranium industry, and Canadian sovereign interests, specifically including the regulation of Canadian uranium marketing and the Uranium Information Security Regulations. The decisions of the New Mexico courts improperly intrude on these intergovernmental consultative processes.[21]

These factors emphasize the error of the court's decision to disregard comity and exercise its enforcement jurisdiction.

The trial court magnified the impact of its error by the manner in which it chose to exercise its enforcement jurisdiction. First, by disputing the Canadian Government's interpretation of its own Regulations, and by questioning the authority of the Minister of Energy, Mines and Resources to address issues regarding the Regulations,[22] the court conducted itself in a way calculated to enter into conflict with the interests of the Government of Canada. Second, by using GAC's non-compliance as the basis for its fact findings, the court in effect used Canada's proper enforcement of its Information Regulations to reach unwarranted determinations regarding Canadian Government activity and decisions, which were taken at the highest governmental level, in respect of the marketing and exporting of Canadian uranium. Third, by entering a default

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[21] *See Federal Maritime Commission* v. *De Smedt*, 268 F. Supp. 972, 974, 975 (S.D.N.Y. 1967) (conflict a matter for diplomatic negotiation); *cf. American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971) (no international relations problem).

[22] Pet. 2 App. at 14a.

judgment and exposing a party to substantial damages, the court's decision poses a continuing problem to international relations in that it will encourage Canadian nationals and residents to violate Canadian law in the future in order to avoid the severe consequences of non-compliance with U.S. judicial processes.

Although this brief has focused on considerations of comity which directly affect the Canadian Government, we are sensitive to the severity of the impact of the trial court's March 2 Order upon petitioner GAC. Accordingly, the Government of Canada also wishes to express its concern that the trial court, in premising its default judgment upon non-production resulting from Canada's insistence that its laws be observed, imposed unwarranted hardship upon a private party. This action conflicts with *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958) (dismissal improper), and *In Re Westinghouse Electric Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10th Cir. 1977) (contempt and fine improper).

CONCLUSION

The New Mexico courts committed grave error in failing to give proper consideration to Canada's laws and in imposing sanctions upon a party which was unable to produce documents without causing a contravention of these laws. We urge this Court to review this case and to uphold accepted principles of international comity.

Respectfully submitted,

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